2019 IL App (1st) 170011-U

FOURTH DIVISION
August 22, 2019

No. 1-17-0011 & 1-17-0012, Cons.

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	Nos. 13 CR 15102 &
	)	13 CR 04045
JASON GURNEAU,	)	
	)	Honorable
Defendant-Appellant.	)	Thomas J. Byrne,
	)	Judge Presiding.

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Gordon and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Where the record showed that defendant understood the nature and the purpose of the proceedings and was able to effectively communicate with counsel, no *bona fide* doubt of defendant's fitness existed to require the trial court to *sua sponte* conduct a fitness examination prior to denying defendant's motion to withdraw his guilty pleas.

¶ 2 Defendant, Jason Gurneau, was charged by indictment with attempted first-degree murder, aggravated criminal sexual assault, robbery, aggravated battery, and resisting or obstructing a peace officer. In a separate indictment, he was charged with aggravated battery to a

corrections officer. Following plea negotiations, defendant pleaded guilty to one count of aggravated criminal sexual assault, and one count of aggravated battery to a corrections officer, and was sentenced to respective consecutive terms of 21 and 3 years' imprisonment. Defendant subsequently moved to withdraw his guilty pleas, and the trial court denied that motion. In this appeal, defendant contends that the trial court erred in denying his motion to withdraw his guilty pleas without first ordering a fitness evaluation or inquiring into defendant's fitness.

¶ 3 The record shows that defendant was charged with attempted first-degree murder, several counts of aggravated criminal sexual assault, robbery, aggravated battery, and resisting or obstructing a peace officer under Case No. 13 CR 4045. The indictments for those charges generally alleged that on or about December 9, 2012, defendant strangled the victim, M.S., penetrated her with his finger, an object, and his penis, by the use of force or threat of force, causing M.S. to suffer a broken nose. The indictments further alleged that defendant committed the criminal sexual assault during a robbery in which he took M.S.'s purse, and that he knowingly resisted Officers Martha Gomez and Gil Lucio, both of whom he kicked and struck about their bodies causing injuries.

¶ 4 He was also charged with two counts of aggravated battery to a corrections officer under Case No. 13 CR 15102. The indictments for those counts alleged that on or about May 31, 2015, defendant spit on and struck Cook County Corrections Officer Enrique Reyes about the body, and caused bodily harm to Officer Reyes, knowing that he was a peace officer, while Officer Reyes was performing his official duties.

¶ 5 On October 29, 2013, during pretrial proceedings, defendant's counsel filed a written motion requesting a determination that *bona fide* doubt existed as to whether defendant was fit to stand trial due to mental illness. Counsel alleged that they "found it nearly impossible to

communicate with" defendant, that defendant was unable to provide counsel with "any coherent information regarding the events that led to his arrest and indictment," and that defendant was "unable to assist counsel in investigating the events or formulating a response to the charges."

¶ 6 The trial court ordered a hearing regarding defendant's fitness, which occurred on June 25, 2014. At the hearing, the State presented the testimony of Dr. Nishad Nadkarni, Supervisor of the Psychiatry Division at Forensic Clinical Services (FCS). Dr. Nadkarni testified that he had evaluated defendant a total of six times, beginning in 2008 and most recently in December 2013 and May 2014. Other FCS staff had also evaluated defendant for fitness on multiple occasions. According to Dr. Nadkarni, defendant had been previously found unfit in 2001, fit with medication in 2002, and fit in 2003. In 2005, defendant was found fit for trial in one report, while another report found him fit with medication. In 2008, 2010 and 2011, defendant was found fit with medication.

¶ 7 Dr. Nadkarni testified that during the December 2013 evaluation, defendant presented as calm and cooperative, and had no psychiatric or cognitive impairment. Defendant's speech was coherent and his thought process did not evidence any psychiatric thinking, process, or content. Defendant knew he was charged with the felonies of attempted murder and aggravated criminal sexual assault, and that he was being represented *pro bono* by attorneys from Jenner & Block. At that time, defendant was prescribed Risperdal, an anti-psychotic and mood stabilizer, and Effexor, an anti-depressant.

¶ 8 Dr. Nadkarni testified that he diagnosed defendant with anti-social personality disorder, and history of alcohol, cannabis, cocaine and heroin use disorder. He also diagnosed defendant with unspecified psychotic disorder due to his history of psychotic symptoms, but he did not believe that defendant currently fit the criteria for schizoaffective disorder, because people with

that disorder tend to have tremendous difficulty in functioning, which defendant did not have. Dr. Nadkarni stated, however, that even someone with schizoaffective disorder could be fit for trial.

¶ 9 Dr. Nadkarni further testified that, in the May 2014 examination, defendant's responses reflected a stable mental status that was appropriate and logical. He was again able to identify the charges, the nature of the courtroom proceedings, the roles of various personnel, and the consequences of a guilty verdict. In Dr. Nadkarni's opinion, defendant was fit to stand trial with medication, and defendant had the capacity to assist counsel in his defense.

¶ 10 Defendant presented the testimony of Dr. Lisa Rone, a clinical psychiatrist, who testified that she met with defendant three times over the previous nine months. She diagnosed defendant with schizoaffective disorder and stated that his "psychotic disorder *** result[ed] in ongoing thought disorder." Dr. Rone testified that defendant's thought disorder made it difficult for defendant to communicate logically and effectively. She opined that defendant was unable to assess recommendations of counsel, give a chronological history of events of the crime, or weigh decisions. She stated that defendant was able to answer if asked a specific question, but if he were allowed to talk for a period of time, his response became illogical and incoherent. Dr. Rone believed that defendant could "certainly" be restored to fitness within six to twelve months with "perhaps more aggressive psychiatric care."

¶ 11 On cross examination, Dr. Rone clarified that she did not disagree that defendant was able to understand the nature of the proceedings against him, but that she did not believe he was able to assist his counsel in his defense. Defendant was able to tell Dr. Rone what a trial, plea, and a felony were. Dr. Rone testified that she normally drafts her own reports, but admitted that

in this case, defense counsel had drafted the report she submitted, and Dr. Rone edited it, "for the sake of trying to conserve finances."

¶ 12 At the conclusion of the hearing, the trial court found that both doctors were "honest and credible," and they were both "thorough in their evaluations." The trial court pointed out various ways in which the doctors agreed, but noted that the "specific disagreement" at issue was whether defendant "was able to assist his counsel." The trial court then stated that the "burden is on the [S]tate, and it is my finding at this point that based upon what I've heard that fitness has not been proven beyond a reasonable—by a preponderance of the evidence, I should say, and therefore I'm going to enter a finding, in fact, that [defendant] is unfit *** to stand trial." The trial court remanded defendant to "the custody of the Department of Human Services for treatment" and ordered defendant "to undergo treatment for the purpose of being rendered fit to stand trial."

¶ 13 Thereafter, on July 2, 2014, Dr. Phyllis Tolley of the Department of Human Services (DHS) evaluated defendant for placement, and found him fit to stand trial. The matter then returned to the trial court for a restoration hearing pursuant to section 5/104-17(b) of the Code of Criminal Procedure, which provides the following:

> "If the defendant's disability is mental, the court may order him placed for treatment in the custody of the Department of Human Services ***. If the court orders the defendant placed in the custody of the Department of Human Services, the Department shall evaluate the defendant to determine to which secure facility the defendant shall be transported[.] *** *If during the course of evaluating the defendant for placement, the Department of Human Services determines that the defendant is currently fit to stand trial, it shall immediately notify the court and*

> *shall submit a written report within 7 days. In that circumstance the placement shall be held pending a court hearing on the Department's report.* Otherwise, upon completion of the placement process, the sheriff shall be notified and shall transport the defendant to the designated facility." (Emphasis added). 725 ILCS 5/104-17 (West 2014).

¶ 14 A two-day restoration hearing was held on December 5 and 12, 2014. Dr. Nadkarni testified that he evaluated defendant a third time for this case on October 20, 2014. Defendant's diagnoses and medications remained consistent, although defendant's dosage of Risperdal had been decreased. Dr. Nadkarni testified that defendant had been on various medication regimens in the past and had not shown significant differences in functioning. Dr. Nadkarni further testified that defendant did not manifest any signs or symptoms of major mental illness or cognitive impairment, and that he was calm and cooperative at the October evaluation. Defendant responded appropriately to questions and provided information in a linear and logical way. Dr. Nadkarni also asked open-ended questions, and defendant was able to answer them. Dr. Nadkarni found no sign of psychosis in defendant's answers.

¶ 15 Dr. Nadkarni further testified that defendant was able to understand the nature of the proceedings against him. He knew that at a bench trial, a judge decided guilt or innocence and, if defendant were found guilty, the judge would impose the sentence. Defendant also understood that a jury was made up of 12 civilians who decided guilt or innocence. Defendant knew that a state's attorney seeks a guilty verdict, while a defense attorney pursued a not guilty verdict. Defendant understood that a guilty plea involved the admission of guilt and a waiver of the right to trial. Defendant also knew that, if found guilty, he faced a sentence of 6 to 30 years' imprisonment, and if found not guilty, he would go home.

¶ 16 Dr. Nadkarni believed that defendant was able to assist counsel in his defense, because he did not demonstrate any psychosis or cognitive impairment that would prevent him from doing so. Defendant "demonstrate[d] an understanding of the nature of the charge, the courtroom proceedings, and the roles of the courtroom personnel," and he displayed a capacity to assist counsel in his defense. Dr. Nadkarni opined that defendant was fit for trial with medication, and that, in Dr. Nadkarni's opinion, it was a "clear-cut case."

¶ 17 Dr. Phyllis Tolley, a clinical psychologist for Metropolitan Forensic Services within DHS, also testified at the restoration hearing. She interviewed defendant on July 2, 2014, and October 28, 2014. At the July interview, she noted that defendant was alert and cooperative, and most of his speech was organized and coherent. He sometimes refused to elaborate on a statement, but she did not observe any psychotic symptoms, looseness of association, or flight of ideas. In July, Dr. Tolley diagnosed defendant with unspecified psychosis. Dr. Tolley and defendant discussed the nature of the proceedings against him, and various court personnel and their roles. In Dr. Tolley's opinion, defendant was able to understand the nature and purpose of the court proceedings against him.

¶ 18 Dr. Tolley's observations of the second interview in October were substantially the same, although she observed that defendant "appeared to be better," in that he had gained some weight, and that he reported liking it there and eating better. Dr. Tolley also observed that, similar to the July evaluation, defendant was alert, cooperative, and "oriented to reality," although he sometimes "went off on [a] tangent" and "needed redirection." Defendant mentioned not liking his medication, although he understood the consequences of "being noncompliant" with the medication. Dr. Tolley testified that she modified defendant's diagnosis after evaluating him in October, changing it to "schizoaffective disorder," because defendant reported suffering from

depression at that time. Dr. Tolley noted, however, that a person could be diagnosed with schizoaffective disorder and still be fit for trial. Dr. Tolley and defendant again discussed the roles of courtroom personnel and the nature of the proceedings against defendant. Defendant provided "very similar" responses, and Dr. Tolley continued to believe that defendant understood the nature of the proceedings against him. Defendant provided coherent and responsive answers, and there were no questions asked by Dr. Tolley relating to defendant's case that he was unable to answer. Dr. Tolley further believed that defendant was able to assist his counsel in his defense. She described defendant as "very articulate" with responses that were "very coherent and organized." She further stated that defendant was "aware of his charges [and] *** the *** possible consequences of the charges." Dr. Tolley opined that defendant was "fit for trial."

¶ 19 Following closing arguments at the restoration hearing, the trial court noted that the "issue today is whether the State has carried their burden, whether they have presented sufficient evidence to prove by a preponderance of the evidence that, in fact, [defendant] has attained fitness. It is my finding that they have." The court explicitly found both Drs. Nadkarni and Tolley testified credibly, before concluding that the criminal case could proceed against defendant.

¶ 20 Thereafter, the case proceeded and the parties prepared for trial. On October 11, 2016, defense counsel informed the court that the parties had "worked out a tentative agreement" and defendant "asked us to request to reopen the 402 [conference] *** to discuss some things with you." The trial court asked defendant if he understood that there was a conference held in the past, and that his lawyers were asking to reopen the conference so that the court could speak to the State and defense counsel about defendant's case. Defendant stated that he understood. The court told defendant that at the conference, it would "hear facts about both of these cases," as

well as about defendant's "history and background," which were things that "ordinarily a judge wouldn't hear about unless there were convictions in the case." The trial court asked defendant if he understood, and defendant answered affirmatively. The court told defendant that if he did not agree with the results of the conference, it would not be "reason enough for [defendant] to have a different judge hear [his] cases." The court asked defendant if he understood, and defendant stated that he did. Defendant then confirmed that he wanted the court to reopen the conference, and the court passed the case for a conference pursuant to Illinois Supreme Court Rule 402.

¶ 21 Following the conference, defendant chose to plead guilty to one count of aggravated criminal sexual assault in case No. 13 CR 04045, and one count of aggravated battery of a peace officer in case No. 13 CR 15102. Pursuant to the negotiated agreement, defendant was sentenced to respective consecutive terms of 21 years' and 3 years' imprisonment. Also as part of the plea agreement, the State agreed to drop the remaining charges, and not to bring charges against defendant on a separate criminal matter involving an alleged sexual assault of a different victim.

¶ 22 The trial court explained the sentences on both charges, that the sentences would be served consecutively, that there would be a mandatory supervised release term of three years, and that defendant would be required to register as a sex offender for the rest of his life. Defendant indicated that he understood. The trial court asked defendant if he had any questions about what the sentence would be if he were to plead guilty, and defendant responded that he did not. The trial court reiterated the sentences, and informed defendant that he would be entitled to up to 15 percent "good time" on the aggravated criminal sexual assault count, and 50 percent "good time" on the aggravated battery count. Defendant indicated that he understood, and had no questions about either of the sentences. The trial court read the charges against defendant in the indictments, and defendant indicated that he understood the charges and wished to plead guilty.

Defendant further indicated that he understood that he was entitled to plead not guilty and have a trial before a judge or a jury, and stated that he "kn[e]w what a jury trial [wa]s." Defendant identified his signature on the jury waivers, stated that he had talked to his lawyers about giving up his right to jury trials before signing them, and acknowledged his understanding that he was formally giving up his right to a jury trial on each of the matters.

¶ 23 Defendant indicated that he understood that by pleading guilty, he was also giving up his right to a trial before a judge, the right to see and hear witnesses from the State, the right to ask questions of those witnesses, the right to call his own witnesses, and the right to testify in his own defense. Defendant also understood that by pleading guilty, he was giving up his right to remain silent, and to make the State prove him guilty beyond a reasonable doubt. Defendant denied that anyone threatened, or promised, him anything to plead guilty, and stated that he was pleading guilty of his own free will.

¶ 24 The State then provided, and defense counsel stipulated to, the following factual bases for the charges. In case No. 13 CR 04045, the evidence at trial would show that on December 9, 2012, the victim, M.S., was at 4434 North Sheridan in Chicago when defendant struck her and knocked her to the ground. Defendant choked the victim, and sexually assaulted her by penetrating her vagina digitally. The victim suffered a broken nose, bruising abrasions and swelling. Defendant was apprehended at the scene, and was positively identified by the victim and a witness.

¶ 25 In case No. 13 CR 15102, the evidence at trial would show that on May 31, 2013, defendant was in custody at the Cook County Jail at 2950 South California in Chicago, when, knowing Cook County Officer Enrique Reyes was a peace officer performing his official duties, defendant struck Officer Reyes about the body, causing bodily harm to Officer Reyes.

¶ 26 The trial court then accepted defendant's plea, finding that it was given knowingly and voluntarily, and that a factual basis existed. The trial court then asked defendant if he understood that he was waiving his right to a presentence investigation report (PSI) for each case.[1] Defendant indicated that he did, and identified his signature on the written waivers. Defendant also answered affirmatively when asked whether he spoke to his counsel about giving up his rights to PSIs, and whether he would like to give up that right and proceed to sentencing. Defendant's counsel confirmed that the State was agreeing not to bring any criminal charges on the "other crimes matter" involving an alleged sexual assault of a different victim, but that defendant was "not acknowledging any guilt in connection with that incident."

¶ 27 The trial court then asked defense counsel if he had met with defendant to discuss the terms of the agreement, and defense counsel assured the trial court, "I met with Mr. Gurneau five times since September 22. I believe I met with him over two hours total to speak about the deal. And I do not have any concerns about his fitness or ability to understand this deal."

¶ 28 The parties rested on the plea agreement, and the trial court asked defendant if there was "anything [he]'d like to say" before the sentence was imposed. Defendant answered, "No."

¶ 29 The court then sentenced defendant pursuant to the plea agreement, to 21 years' imprisonment for one count of aggravated criminal sexual assault in case No. 13 CR 04045, and a consecutive 3 year sentence for one count of aggravated battery of a peace officer in case No.

[1] A discussion of defendant's criminal history apparently occurred off the record during the 402 conference between the trial court and the parties. A review of defendant's criminal history report in the record indicates that defendant had previously been convicted of forgery in 2011 and sentenced to two years' imprisonment; battery in 2010 and sentenced to 60 days' imprisonment; impersonating a police officer in 2010 and sentenced to 1 year imprisonment; aggravated battery in 2009 and sentenced to 4 years' imprisonment; burglary in 2005 and sentenced to 4 years' imprisonment; possession of a controlled substance in 2003 and sentenced to 15 months' imprisonment; and aggravated battery of a peace officer in 2002 and sentenced to 2 years' probation.

13 CR 15102. The trial court confirmed twice that defendant understood the sentences, and then admonished him of his appellate rights. Defendant stated that he understood.

¶ 30 Thereafter, on November 9, 2016, defendant filed a motion to withdraw his guilty pleas. The handwritten unnotarized "affidavit" attached to defendant's motion stated the following:

> "1. I am innocent of the charges that were brought against me in Case No. 13-CR-4043 and Case No. 13-CR-15102.
>
> 2. One of the reasons I pled guilty is because I thought that the judge did not like my attorneys and did not like me.
>
> 3. Also, I was depressed and wanted to get out of Cook County Jail.
>
> 4. The sentences imposed against me were too harsh.
>
> 5. I did not have an opportunity to tell my side of the story."

¶ 31 Eight days later, on November 17, 2016, the parties appeared before the trial court on defendant's motion to withdraw his guilty pleas. The following exchange occurred:

> DEFENSE COUNSEL: Your Honor, there is one issue I'd like to raise, and that is if—number one, we had no concerns as to our client's fitness on October 11, which was the day of the plea deal in this case.
>
> Since then, we understand that Mr. Gurneau has stopped taking his medications to treat mental illness. We filed the motion to withdraw the guilty pleas and vacate the judgments at our client's request to preserve his rights.
>
> But we do have concern as attorneys that he, due to his mental illness, isn't in a state where he can fully comprehend the consequences of the motion, if it were to be granted.

> So, if, after hearing argument on the motion to withdraw, if the court is inclined to grant it, we would request that before your Honor rules, that you would have him evaluated for fitness before ruling on it. And we do have a motion to that effect.
>
> COURT: So you—your position is, his fitness for these proceedings are only relevant if the Court's inclined to grant the relief he's requesting.
>
> DEFENSE COUNSEL: Your Honor, yes. Our concern, specifically, is with his ability to appreciate the consequences of the motion. If it were to be granted—"

¶ 32 The trial court asked counsel if he had discussed the potential consequences of the motion to withdraw his plea, should it be granted, and the "maximum sentence that could be imposed" if the plea was withdrawn and defendant was found guilty. Counsel stated that he had talked to defendant about the consequences of "the motion being granted, and having a retrial, and sentencing that could occur then." The trial court asked counsel if, based on those conversations, defendant still wanted to proceed on the motion, and counsel stated that defendant did. The trial court then turned to defendant and asked if that was correct, and defendant answered, "Yes, sir, your Honor." The court then confirmed that defendant would "like [the court] to hear the arguments and consider the pleadings, and make a ruling on whether or not [it was] going to allow [defendant] to withdraw [his] guilty pleas." Defendant responded, "Yes, your Honor."

¶ 33 Defense counsel then tendered the written fitness motion to the court. The trial court expressed concern about the fact that the motion was "based on the Court's inclination," but passed the matter to review defendant's motion. Upon returning to the bench, the trial court stated:

> "I passed this matter so I could review the Defendant's motion for fitness [examination] in the event the Court is inclined to grant a motion to withdraw a guilty plea.
>
> I have had the opportunity to read your motion, [defense counsel], that you filed on behalf of your client. I've also had an opportunity to review the fitness statute.
>
> What you're asking in your motion, is for the Court to do something based on an inclination. I find that the motion is improper. The—not improper so much as the request is something that I wouldn't be able to grant, the relief that you're asking for.
>
> The statute does talk about the circumstances of which the Defendant's fitness is at issue, and that's certainly pretrial, before a trial takes place, in order to enter a plea of guilty and sentencing. This is a post-conviction matter.
>
> ***
>
> I'm going to deny your request to file the motion for fitness determination in the event the Court is inclined to grant the motion to withdraw the guilty plea."

¶ 34 The court then proceeded to consider defendant's motion to withdraw the guilty plea. After the parties rested on the pleadings, court noted that it had conducted several Rule 402 conferences in this matter, that the sentences defendant pleaded to were "less than even the initial offer by the Court on the initial 402 conference," and that defendant "was clearly aware of what the sentence would be." The court also stated that defendant's sentences were "significantly less than the upper end of the sentencing range the Defendant [wa]s facing," and that defendant "had a significant period of time to consider the sentence." The trial court pointed out that, contrary to

the allegation in defendant's affidavit, defendant "did, in fact, have an opportunity to address the Court and be heard, an opportunity in allocution to say whatever he felt was pertinent." The court also stated that there "was certainly a factual basis to accept the guilty plea" and the "evidence that the State laid out during the plea were clear indications of the Defendant's guilt, which he acknowledged at the time he entered the plea." Finally, the court found no basis for defendant's belief that the Court "didn't like him or his attorneys" and, accordingly, denied defendant's motion to withdraw his plea.

¶ 35 Defendant filed a timely notice of appeal from that order, and in this court, defendant contends that the trial court erred in denying his motion to withdraw his guilty pleas without first ordering a fitness evaluation or inquiring into defendant's fitness. Defendant specifically contends that there existed *bona fide* doubt of his fitness, based on his prior finding of unfitness, his "long history of severe mental health issues," counsel's report that defendant had "stopped taking his medications," and defendant's report that he was "suffering from depression while in jail."

¶ 36 We note that in this case, defense counsel apparently filed a written motion for a fitness examination, which the court denied, and a copy of that motion does not appear in the record on appeal. Although the failure to include the relevant motion in the record on appeal would ordinarily be fatal to an appellant's case (see *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984)), it is not the court's denial of this motion with which defendant takes issue here. Instead, defendant contends that the trial court should have *sua sponte* ordered a fitness hearing before ruling on defendant's motion to withdraw.

¶ 37 Normally, "the initial question of whether a *bona fide* doubt exists regarding fitness lies entirely within the sound discretion of the trial court and its determination will only be

overturned for an abuse of discretion." *People v. Logan*, 50 Ill. App. 3d 460, 462 (1977). Here, however, the trial court did not explicitly make a determination of whether *bona fide* doubt existed. Instead, defendant is challenging the trial court's lack of inquiry into his fitness. Defendant contends that certain facts before the trial court established *bona fide* doubt of his fitness, and accordingly, that the court erred by not *sua sponte* ordering a fitness hearing. In these circumstances, we will consider defendant's claim *de novo*. See *People v. Newborn*, 379 Ill. App. 3d 240, 248 (2008) (holding that when a trial court fails to exercise discretion, it precludes a deferential standard of review).

¶ 38 Pursuant to section 104-11(a) of the Code of Criminal Procedure (Code), the issue of defendant's fitness to stand "trial, to plead, or to be sentenced may be raised by the defense, the State, or by the Court at any appropriate time *before a plea is entered* or before, during, or after trial." (Emphasis added) 725 ILCS 5/104-11(a) (West 2014). Defendant in this case, however, is not raising an issue of his fitness to stand trial, plead, or be sentenced, and his allegations arise after he entered a plea, was convicted, and was sentenced pursuant to the plea agreement. While a court must still consider defendant's post-conviction competency, our supreme court has stated that a different standard applies in the context of post-conviction claims of unfitness. *People v. Owens*, 139 Ill. 2d 351, 363 (1990) ("We also observe that a greater degree of incompetence must be shown to demonstrate that a petitioner is not competent to participate in post-conviction proceedings than is required to show that a defendant is not competent to stand trial."); *People v. Shum*, 207 Ill. 2d 47, 62 (2003) (internal citation omitted) ("This fitness standard in postconviction proceedings is less demanding than the standard for fitness to stand trial. These standards vary because of the disparate nature of the proceedings."); *People v. Carpenter*, 13 Ill. 2d 470, 480 (1958) (the safeguards applicable to an original trial are not necessarily applicable to

post-conviction determinations of sanity). We acknowledge, however, that at least one appellate court decision has found that a trial court abused its discretion by failing to order a fitness hearing before proceeding to a hearing on defendant's motion to withdraw his guilty plea, using the same fitness analysis applicable before a plea or trial. *People v. Zelenak*, 2014 IL App (3d) 120639, ¶ 18 ("As a direct attack on the underlying conviction, defendant must be able to assist his counsel to very nearly the same degree [with a motion to withdraw a guilty plea] as was necessary at the time that his guilt or innocence was determined."); but see *Zelenak*, 2014 IL App (3d) 120639, ¶ 30 (Schmidt, J., dissenting) (Although it is a violation of due process to convict an unfit defendant, "Defendant had already been convicted. This motion [to withdraw his plea] was not about convicting defendant but, rather, 'unconvicting' defendant."); *Owens*, 139 Ill. 2d at 362-63 ("A post-conviction petitioner does not make his claim of incompetency against a clean slate. On the contrary, in order to have been convicted and sentenced, the petitioner must have been deemed competent to stand trial, or his competency must have been sufficiently clear as not to raise a serious question for the trial court. The court therefore may properly presume that the petitioner remains competent at the time of post-conviction proceedings, and require a substantial threshold showing of incompetency to trigger the right to a psychiatric evaluation or an evidentiary hearing on the question.").

¶ 39 Nonetheless, even assuming that defendant's fitness after his guilty plea is analyzed under the same, more demanding standard as a defendant's fitness prior to entering a plea, we would conclude that no *bona fide* doubt of defendant's fitness existed as to require the trial court to conduct a fitness hearing.

¶ 40 A defendant is presumed fit absent circumstances raising a *bona fide* doubt of his fitness. 725 ILCS 5/104-10 (West 2014); *People v. Sanchez*, 169 Ill. 2d 472, 482 (1996). "Fitness speaks

only to a person's ability to function within the context of a trial. It does not refer to sanity or competence in other areas. A defendant can be fit for trial although his or her mind may be otherwise unsound." *People v. Easley*, 192 Ill. 2d 307, 320 (2000) (citing *People v. Murphy*, 72 Ill. 2d 421, 432-33 (1978)); see also *People v. Eddmonds*, 143 Ill. 2d 501, 519-20 (1991). "A defendant is unfit if, because of his mental or physical condition, he is unable to understand the nature and purpose of the proceedings against him or to assist in his defense." 725 ILCS 5/104-10 (West 2014). " '[T]he existence of a mental disturbance or the need for psychiatric care does not necessitate a finding of *bona fide* doubt.' " *People v. Tuduj*, 2014 IL App (1st) 092536, ¶ 89 (quoting *People v. Hanson*, 212 Ill. 2d 212, 224-25 (2004)). "The issue is not mental illness, but whether defendant could understand the proceedings against him and cooperate with counsel in his defense. If so, then, regardless of mental illness, defendant will be deemed fit to stand trial." *Easley*, 192 Ill. 2d at 323.

¶ 41 Because it is a violation of due process to convict a defendant who is mentally unfit to stand trial, a judge has a duty to order a fitness hearing *sua sponte* once facts are brought to the judge's attention that raise a *bona fide* doubt of the accused's fitness. *People v. McCallister*, 193 Ill. 2d 63, 110-11 (2000). A number of factors may be considered in determining whether a *bona fide* doubt of fitness is raised, including: "a defendant's irrational behavior, demeanor at trial, any prior medical opinion on the defendant's competence, and any representations by defense counsel on the defendant's competence." *People v. Brown*, 236 Ill. 2d 175, 186-87 (2010).

¶ 42 Based on our review of the record in this case, we find no facts raising a *bona fide* doubt of defendant's fitness to require the trial court to *sua sponte* conduct a fitness hearing.

¶ 43 The record demonstrates that defendant had most recently been found fit for trial after examinations by two mental health professionals who provided testimony at the restoration

hearing. Dr. Nadkarni testified that defendant did not manifest any signs or symptoms of major mental illness or cognitive impairment, that he was calm and cooperative, that he responded appropriately to questions, and that there was no sign of psychosis in defendant's answers. Dr. Tolley testified that defendant was alert and cooperative, that he provided coherent and responsive answers, and that he was "very articulate." Both doctors testified that defendant understood the nature of the charges, the courtroom proceedings, and the roles of courtroom personnel, and further, that he displayed a capacity to assist counsel in his defense.

¶ 44 Moreover, the record shows that throughout the proceedings, including at the hearing on his motion to withdraw his plea, defendant consistently responded appropriately to the court's inquiries, and did not display any irrational behavior or inappropriate demeanor. The court also inquired of defendant's understanding of the consequences of moving forward on his motion to withdraw his plea based on conversations with counsel, and asked defendant if he still wanted to proceed on the motion. In doing so, the court had the opportunity to observe defendant firsthand and did not express any concerns or make any observations regarding defendant's conduct or understanding of the proceedings. See *Hanson*, 212 Ill. 2d at 224 ("While a cold record may be an imperfect means of evaluating defendant's behavior and demeanor, we note that the trial court had the opportunity to observe defendant's conduct and demeanor firsthand during the proceedings, yet expressed absolutely no concerns about defendant's ability to understand the nature of the proceedings or to work with counsel.").

¶ 45 Further, defense counsel indicated that he had no concerns about defendant's fitness at the time of his plea, stating, "I met with Mr. Gurneau five times since September 22. I believe I met with him over two hours total to speak about the deal. And I do not have any concerns about his fitness or ability to understand this deal." Counsel reaffirmed that statement at the hearing on

defendant's motion to withdraw his pleas, stating that "we had no concerns as to our client's fitness on October 11, which was the day of the plea deal in this case." Counsel then went on to express a concern that defendant was not able to "fully comprehend the consequences of the motion [to withdraw his guilty pleas], *if it were to be granted*" (emphasis added), however, counsel explicitly specified that counsel's fitness concerns were contingent, and "only relevant" if the trial court were inclined to allow defendant to withdraw his plea. Counsel also expressed no difficulties in consulting with defendant on his motion to withdraw his pleas, but seemed to base his ambiguous fitness concern on counsel's disagreement with defendant's strategic choice to move to withdraw his pleas. After a review of the factors in these circumstances, we find no *bona fide* doubt of defendant's fitness that would require the court to *sua sponte* order a fitness hearing. *Brown*, 236 Ill. 2d at 186-87.

¶ 46 Defendant, however, raises four grounds on which the trial court should have found that *bona fide* doubt of his fitness existed. Specifically, defendant bases his contention on his prior finding of unfitness, his "long history of severe mental health issues," defendant's report that he was "suffering from depression while in jail," and counsel's report that defendant had "stopped taking his medications."

¶ 47 First, we do not find the court's prior finding of unfitness in June of 2014 to create a *bona fide* doubt of defendant's fitness at the time he filed his motion to withdraw his guilty pleas in October of 2016, particularly where, as here, defendant was restored to fitness, and found fit to stand trial, subsequent to the original determination. A defendant's fitness or unfitness is not a permanent condition; a defendant who has previously been found unfit, can be restored to fitness after "a valid hearing finding him fit." *People v. Payne*, 2018 IL App (3d) 160105, ¶ 10 (citing *People v. Thompson*, 158 Ill. App. 3d 860, 865 (1987).

¶ 48 We are also unconvinced that either defendant's history of mental health issues, or defendant's self-report of suffering from depression while in jail, created a *bona fide* doubt of his fitness. As stated above, the " 'existence of a mental disturbance or the need for psychiatric care does not necessitate a finding of *bona fide* doubt,' " (*Tuduj*, 2014 IL App (1st) 092536, ¶ 89 (quoting *Hanson*, 212 Ill. 2d at 224-25)), and the "issue is not mental illness, but whether defendant could understand the proceedings against him and cooperate with counsel in his defense" (*Easley*, 192 Ill. 2d at 323). See *People v. Harris*, 206 Ill. 2d 293, 305 (2002) ("Taking as true defendant's allegations that he suffers from mental impairments ***, these allegations do not necessarily establish that defendant was unfit."). Here, we find no indication that defendant's history of mental health issues, or his recent report of depression, prevented him from understanding the proceedings or cooperating with counsel in his defense. Importantly, defendant had previously reported suffering from symptoms of depression to Dr. Tolley, when she evaluated him prior to the restoration hearing. Dr. Tolley adjusted defendant's diagnosis based on defendant's report of suffering from depression, but did not find that defendant's depression, or his updated diagnosis, made him unfit. Despite defendant's reported depression at that time, Dr. Tolley maintained that defendant was able to understand the nature and purpose of the proceedings against him, and to assist in his defense. The trial court explicitly found Dr. Tolley credible, and found defendant fit to stand trial. Accordingly, defendant's report of depression in his motion to withdraw his plea did not provide any new evidence that was not already considered by the trial court at the time it previously found him fit to stand trial.

¶ 49 Finally, defendant contends that the trial court should have found that *bona fide* doubt existed based on defense counsel's report to the trial court that counsel had learned that defendant had stopped taking his medications.

¶ 50 As described previously, at the hearing on defendant's motion to withdraw his guilty pleas, defense counsel stated the following: "we had no concerns as to our client's fitness on October 11, which was the day of the plea deal in this case. Since then, we understand that Mr. Gurneau has stopped taking his medications to treat mental illness."

¶ 51 Counsel's statement to the court gave no particular basis for his "understand[ing]" that defendant stopped taking his medication, nor did counsel give any specific indication of when defendant stopped taking his medication in the almost one month following the October 11, 2016, plea hearing.[2] See *People v. Hall,* 186 Ill. App. 3d 123, 132–33 (1989) (where defense counsel stated that " 'it was [his] knowledge' that defendant had not received any medication," but "did not state the facts which formed the basis of that knowledge," counsel's "failure to state any underlying facts prevented the trial court from *independently* evaluating the reliability of that knowledge." (Emphasis in original)). There is also no indication from the record that defendant would immediately decompensate after stopping his medications, to the point where he would be no longer fit. Importantly, there is no evidence in the record showing that at any point following his plea, defendant became unable to understand the proceedings, or assist counsel in his defense. To the contrary, as stated above, defendant consistently displayed appropriate behavior in the court proceedings, and was able to assist counsel in preparing a motion to withdraw his pleas, including submitting an attached and signed statement which set out his allegations. In these circumstances, we do not find counsel's statement to raise *bona fide* doubt of defendant's fitness. See *People v. Woodard*, 367 Ill. App. 3d 304, 320 (2006) (the defendant did not raise a

[2] We disagree with defendant's contention that counsel's statement "raised the possibility that [defendant] had not been taking his medication when he entered into his guilty plea agreement." Counsel never indicated that defendant was not taking his medication at the time of the plea hearing, and reaffirmed his prior opinion that he had no concerns about defendant's fitness at that time. In these circumstances, we do not find defendant's suggestion to be a fair interpretation of counsel's statement.

bona fide doubt of her fitness to stand trial despite the fact that she had ceased taking her antidepressant medication, and there were two reports that she attempted suicide. "[W]hile certainly a cause for concern," such facts did not "amount to evidence sufficient to sustain a *bona fide* doubt as to her fitness to stand trial and sentencing" where there was no evidence that her "behavior was anything other than interested, rational, and appropriate, nor [wa]s there any indication by the court or defense counsel that defendant was unable to understand the nature of the proceedings against her or to assist counsel in her defense."); see also *People v. Brown*, 239 Ill. App. 3d 1077, 1080-87 (1992) (despite defendant's allegations that he had not been taking his prescribed medications at trial or before entering plea, the trial court did not abuse its discretion by refusing to allow the defendant to withdraw his plea or to order a fitness examination where the trial court had "extensive opportunities to observe defendant," and defendant's behavior did not "indicate a lack of understanding of the proceedings.")

¶ 52 After analyzing the relevant factors in our *de novo* review, we cannot say the record is sufficient to support a finding of a *bona fide* doubt requiring the trial court to *sua sponte* order a fitness hearing. The record in this case illustrates that defendant understood the nature and the purpose of the proceedings and was able to communicate effectively with counsel. *Brown*, 236 Ill. 2d at 186.

¶ 53 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 54 Affirmed.